

## Can a member of an LLP be a worker under ERA 1996?

The Court of Appeal has recently held in (1) *Clyde & Co LLP* (2) *Morris v Bates van Winkelhof* that the effect of s.4(4) of the Limited Liability Partnerships Act 2000 is that a member of an LLP who would have been a partner under the Partnership Act 1890 cannot be either an employee or a worker under s.230(3) of the Employment Rights Act 1996. As a result of this case, members of an LLP are not protected by numerous statutory rights which are afforded to workers. Mohinderpal Sethi reports on the implications of this landmark ruling



**Sethi: LLP members will still be able to rely on anti-discrimination protection**

### The essential facts

Ms Bates van Winkelhof was an equity member of a law firm, which was a limited liability partnership registered under the Limited Liability Partnership Act 2000. She made a disclosure that the managing partner of the Tanzanian law firm, to which she had been seconded as part of a joint-venture, had been involved in money laundering and had paid bribes both to secure work and to affect the outcome of cases. Ms Bates van Winkelhof was suspended by the LLP and, following an internal investigation, expelled as a member of the LLP.

She brought a whistleblowing claim against the LLP under s.47B of ERA 1996 alleging that she had suffered various detriments, in particular being expelled as a member on the ground that she had made protected disclosures in respect of the managing partner of the Tanzanian law firm. Ms Bates van Winkelhof also claimed sex discrimination against the LLP and a senior equity member of the LLP directly involved in her expulsion under s.45 of the Equality Act 2010, alleging that she had been treated less favourably than a male partner would have been treated and that her expulsion was pregnancy-related.

### The worker issue

Under s.230(3) ERA 1996, the concept of a 'worker' encompasses both:

- (a) employees, being persons employed under contracts of employment – see s.230(3)(a) and
- (b) those who personally undertake to provide work for another, but do not qualify as employees under limb (a) or are independent contractors – see s.230(3)(b).

Of course, there are now numerous statutory rights enjoyed by workers who are not employees. Not only has the law had to develop principles in order to distinguish employees from workers, it has also had to distinguish workers from those who are essentially independent contractors working for themselves (see, for example, *Cotswold Development Construction Ltd v Williams*, *Byrne Bros (Formwork) Ltd v Baird* and *Jivraj v Hashwani*). The statutory definition of 'worker' tries to make the latter distinction by focusing on the need for the recipient of the individual's services to be someone other than the client or customer of a profession or business carried on by the individual.

In the Court of Appeal, the LLP essentially contended that the claimant was neither an employee nor a worker as defined by

s.230(3) of ERA 1996 and accordingly was not entitled to bring a whistleblowing claim.

The LLP's appeal was argued on two grounds: first, that an equity member was not in a subordinate relationship to the LLP; and secondly (an issue not advanced below), that the claimant could not be a worker because of the effect of s. 4(4) of the Limited Liability Partnership Act 2000.

This relates to the employment status of members and provides:

*'A member of a limited liability partnership shall not be regarded for any purpose as employed by the limited liability partnership unless, if he and the other members were partners in a partnership, he would be regarded for that purpose as employed by the partnership.'*

The LLP argued that instead of asking whether the member is employed by the LLP, the question is whether she would have been so employed had the LLP been a partnership with unlimited liability under the Partnership Act 1890. It was accepted that this would not disqualify the claimant from bringing her discrimination claims because s.45 of the Equality Act 2010 specifically extends the relevant protection of that Act to partners of limited liability partnerships, just as s.44 does to partners in partnerships governed by the 1890 Act.

### Analysis

It is important to analyse just how the Court of Appeal has reached a conclusion that some practitioners will find surprising. The first question for the Court of Appeal was: if there had been a partnership under the 1890 Act, would the claimant have been a partner? In Elias LJ's view, there was no doubt that the claimant would have been a partner. She was plainly pursuing a business for profit in common with others.

The next question was: if being a partner of a partnership formed under the 1890 Act means that the claimant is regarded as 'employed by the limited liability partnership', does this mean employed as a worker widely defined (ie, covering both limb (a) employees and limb (b) workers), or do the words simply mean employed as an employee? If, as contended by the claimant, the words meant the latter, then

## Unless successfully appealed, this case means that partners are simply not able to claim breaches of numerous statutory rights based on worker status

s.4(4) would not be of any relevance to whether a member of an LLP could be a limb (b) worker under ERA 1996.

Elias LJ tackled this issue in the following way. He held that the meaning of s.4(4) of the 2000 Act had to be gleaned from the context in which the provision was passed. He considered that the intention of Parliament was that whatever the employment status of partners under the 1890 Act, it should not alter when partners under the 1890 Act were transformed into members of a limited liability partnership under the 2000 Act. It followed that the words 'employed by the limited liability partnership' in s.4(4) meant employed as an employee or as a worker under s.230(3)(a) and (b) ERA 1996.

Elias LJ observed that there was no case that had ever considered whether a partner could be a limb (b) worker under ERA 1996. However, analogous authorities on the employment status of a partner clearly establish the principle that a partner in an 1890 Act partnership cannot be an employee (see *Ellis v Joseph Ellis & Co*, *Cowell v Quilter Goodison Co* and *Tiffin v Lester Aldridge LLP*).

The Court of Appeal reasoned that partners cannot have limb (b) worker status for essentially two reasons. First, as a matter of law, 'the partnership is not a separate legal entity, the parties are in a relationship with each other and accordingly each partner has to be employed, inter alia, by himself. He would be both workman and employer, which is a legal impossibility.'

The second reason, which Elias LJ describes as 'more sociological' than legal, is that the very concept of employment presupposes the worker being subordinate to the employer, but where the relationship is one of partners in a joint-venture, that characteristic is absent. It lacks the relationship of service and control which is inherent in both concepts of employee and limb (b) worker.

On this basis the Court of Appeal held that a member of an LLP who would have been a partner in an 1890 Act partnership had it not been registered as an LLP could be neither an employee under s.230(3)(a) nor a worker under s.230(3)(b). As a result, the claimant could not pursue her whistleblowing claim.

Arguably, Elias LJ has not placed sufficient weight on the proposition that in an LLP the partner provides his services for the benefit of the LLP as an entity, but since those partnership services are not being provided to the partnership as a client, the worker definition should be satisfied.

Given that s.4(4) was held to apply, the Court of Appeal did not have to resolve the question of whether a member of an LLP could be a limb (b) worker in the absence of s.4(4). His Lordship was tentatively of the view that a member of an LLP

would not, by virtue of that status alone, constitute either an employee or a limb (b) worker.

### Where does this leave LLP members?

Until the judgment in this case, the number of claims brought by partners based on worker status had been steadily increasing year on year, especially whistleblowing and discrimination claims for which compensation is, of course, uncapped.

The judgment may well be appealed to the Supreme Court so practitioners in partnership litigation will be watching this space very closely indeed. Unless successfully appealed, this case means that partners are simply not able to claim breaches of numerous statutory rights based on worker status, such as claims for whistleblowing, unlawful deductions, working time and holiday pay, minimum wage, the right to be accompanied at grievance and disciplinary hearings, and rights under the new pension auto-enrolment regime, to name just a few. LLP members, however, will still be able to rely on anti-discrimination protection provided by the Equality Act 2010 and on any rights contained in the members agreement itself.

Elias LJ posed, without answering, the very different but tantalising question of whether a member could enter into some separate employment relationship with the partnership, as company directors often do, and whether this would yield a different result, pointing out that in such a case there would be no issue of employment status arising simply out of the status of being an LLP member. This issue will no doubt be the subject of a future partnership dispute

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### Cases referred to:

(1) *Clyde & Co LLP* (2) *Morris v Bates van Winkelhof* [2012] EWCA Civ 1207

*Cotswold Development Construction Ltd v Williams* [2006] IRLR 181

*Byrne Bros (Formwork) Ltd v Baird & ors* [2002] ICR 667

*Jivraj v Hashwani* [2011] ICR 1004

*Ellis v Joseph Ellis & Co* [1905] 1 KB 324,

*Cowell v Quilter Goodison Co* [1989] I.R.L.R. 392

*Tiffin v Lester Aldridge LLP* [2012] EWCA Civ 35, [2012] 1 W.L.R. 1887